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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 343

IN THE MATTER

OF

WISE SHOE COMPANY, INC.,

Debtor.

MOHONK REALTY CORPORATION,

Petitioner-Appellant,

WISE SHOE STORES, INC.,

Appellee.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Appellee.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petition for writ of certiorari to review a judgment entered May 3, 1940, by the United States Circuit Court of Appeals, Second Circuit, affirming an order, dated December 14, 1939, made by Hon. Robert P. Patterson, United States Circuit Judge, sitting in the United States District Court, Southern District of New York, denying appellant's motion (a) to vacate and set aside the final decree of the District Court dated June 30, 1939, in the reorganization proceedings herein; and (b) amending the

plan of reorganization by requiring the reorganized corporation to assume all unexpired leases of the debtor which were not rejected.

CRITICISM OF QUESTIONS PRESENTED BY PETITIONER.

While contending that there are no questions requiring a review by this court, we, nevertheless, wish to point out that the questions presented by petitioner (petition, pp. 2-3) are based on false premises. Question (1) assumes that the amended plan of reorganization did not "on its face" disclose that the new corporation, appellee, was not to assume unrejected leases. It will be shown herein that this is not so and that that fact was apparent from the plan. Question (2) assumes the invalidity of the plan and the "ignorance" of the District Court of the foregoing provision when the plan was confirmed, neither of which hypotheses we will show to be well-founded. Question (3) will likewise appear to be without substance as the facts are unfolded, and that there was neither fraud nor misappropriation of assets.

FACTS.

The statement of facts in the petition is so replete with unsubstantiated charges and statements both *dehors* and in contradiction of the record, that an accurate summary of the facts as they appear from the record becomes necessary.

A petition for reorganization under former Section 77B of the Bankruptcy Act was filed in the District Court on August 19, 1938, and was approved by order dated the same day (R. 3).

On October 25, 1938, a plan of reorganization (R. 2-7) was filed and in January, 1939, an amended plan (R.

8-18) was filed by a committee usually labelled by itself (R. 9, 10), its attorneys and the court (R. 19) and petitioner and its counsel (R. 27, 29, 30, 46, 48 and 53) as the Merchandise Creditors Advisory Committee, which committee was denominated by the court as "a" creditor's committee (R. 79). In fact, in petitioner's brief to the Circuit Court it referred at page 5 to "the merchandise creditors, who constituted the Creditors' Committee," and did not argue, as it does now (petition p. 4), that the committee "purported to act for all the creditors". (This recital does not constitute the slightest concession as to the validity of petitioner's criticism of the committee, but it demonstrates, by way of illustration, the unreliability of such purported statements of fact in the petition as that on page 4 wherein the petitioner says, "Although the Committee was composed solely of merchandise creditors, it did not label itself as a Merchandise Creditors' Committee, but called itself a Creditors' Advisory Committee".)

The amended plan was confirmed on April 3, 1939 (R. 21) and the final decree terminating the proceeding and closing the case was made on June 30, 1939 (R. 19-20).

The confirmed plan proposed that a new corporation be formed to which all the assets of the debtor should be transferred (R. 9) and that

> "The debtor and/or the debtor in possession shall likewise assign to the new corporation, all unexpired leases, except such as may be rejected by the debtor" (R. 10).

The plan (R. 8-18) was brief and simple. It described the assets of the debtor to be assigned to the new corporation (R. 9-10), including unrejected leases, vested the same in the new corporation free of claims or liens not

"expressly provided in this Plan" (R. 10) and expressly enumerated the claims to be assumed by the new corporation (R. 11-13), and it reserved to the "Debtor" the right to disaffirm executory contracts, including unexpired leases, on ten days notice prior to the hearing on confirmation of the plan. It did not provide that such contracts not rejected by the debtor, but assigned by it to the new corporation, were to be assumed by the new corporation, and, as stated, the new corporation was to be liable only for obligations expressly assumed and enumerated under the plan.

All the stock of the new corporation was to be issued to the creditors of the debtor (R. 39); *the stockholders of the debtor were to receive nothing* (R. 14). This plan was fully executed and the final decree followed (R. 19-20).

The final decree enjoined creditors, claimants and stockholders from proceeding against the new corporation or the assets transferred to it, except as to such liabilities and claims expressly assumed by the new corporation (R. 20).

Prior to the reorganization proceeding, and on August 18, 1936, petitioner leased certain premises to the debtor for a ten year term (R. 29).

At the time of the reorganization this lease was in effect. The petitioner formally appeared in the proceeding (R. 81) and on September 9, 1939, petitioner waived the right to terminate the lease (R. 58-60). Several *ex parte* applications were made to the court to extend debtor's time to disaffirm the lease in question (R. 31, 52).

In March, 1939, petitioner moved the court, by David W. Kahn, Esq. (who is still representing petitioner on

this application) to compel the debtor in possession to pay rent (R. 52). Mr. Kahn was at all times familiar with the amended plan of reorganization and of all the steps taken in the proceeding (R. 42). In fact he was counsel for the debtor (R. 66, 67, 71-73) and took active part in discussions concerning the leases (R. 68-69).

Petitioner received all notices in the proceedings; it received notice of approval of the amended plan together with the amended plan and a form of acceptance; it received notice of the hearing on the confirmation of the amended plan (R. 38-39).

The lease in question was not rejected (R. 31) but in accordance with the terms of the amended plan (R. 10), was assigned by the debtor to the new corporation (R. 22).

After confirmation, but before final decree, I. Alfred Levy, on behalf of a client who was interested in purchasing the stock of the new corporation, investigated the business of the corporation and the reorganization records (R. 37-38). He ascertained that the leases (including the one in question) had been assigned to, but not assumed by the new corporation (R. 38).

Thereafter, his offer to purchase the stock of the new corporation was made and accepted (R. 39-40) and accordingly Mr. Levy's clients invested approximately $225,000 in cash (R. 41), of which sum of $141,000 was paid into the treasury for working capital, for which a second preferred stock was issued; $45,569.35 was paid to the voting trustees for the benefit of most of the former creditors of the debtor corporation who held voting trust certificates issued to them under the plan, in satisfaction of their claims, while the few remaining creditors elected to take first preferred stock amounting to $39,000 in the

new corporation (R. 40). Those creditors who elected to take cash received 20% of the amount of their claims against the debtor (R. 49). One-half of this investment was made by two former creditors of debtor and one-half by thirteen others (R. 81, 39-40).

This investment of new money was made in reliance upon the decree and the order confirming the plan (R. 41) and further upon the fact that the leases had not been assumed by the new corporation (R. 38, 82). This is not disputed (R. 82).

On August 9th, 1939, Mr. Kahn (of counsel herein for petitioner) communicated with one of the voting trustees and directors of the new corporation and inquired whether the leases had been assumed by the new corporation, but was advised by said trustee that he had no information concerning the leases (R. 63, 77).

In October, 1939, there were discussions between the petitioner and appellee concerning a rent reduction and petitioner was advised that unless a reduction was made, appellee would be compelled to remove from the premises (R. 33).

Thereafter, by notice of motion dated November 9, 1939, petitioner moved the court below for an order vacating the final decree and amending the order of confirmation by providing that the appellee assume all leases not rejected in the proceeding (R. 27-28).

From the order denying such motion (R. 83-84) petitioner appealed (R. 93-94) to the Circuit Court, which unanimously affirmed the decision of the District Court (R. 93-94).

ARGUMENT.

The record does not justify petitioner's assertions (petition, p. 14) that this application goes to the roots of the preservation of honesty in reorganizations and involves fundamental questions regarding the methods of sharp dealing creditors' committees, which assertions petitioner seeks to use as a lever to obtain a review by this court of what actually involved no more than a simple question of judicial discretion.

1. The record does not show that the plan was tainted with fraud.

Petitioner moved in the District Court on the theory that the omission from the plan of a provision for assumption of leases by the new corporation was a fraud upon it and upon other lessors. The record is barren of any proof of fraud. Aside from petitioner's mere unsubstantiated assertions of fraud the facts are: Petitioner, who filed a formal notice of appearance in the proceeding (R. 81) and who waived its right to terminate the lease and come in as a creditor, and who moved in the proceeding to compel payment of rent (R. 31, 52), and who received notice of all steps in the proceeding as well as a copy of the plan of reorganization and the notice of the hearing to confirm the plan (R. 38-39), and who stood by and allowed confirmation without objection, and who without complaint watched the plan consummated, and who knew that a substantial amount of new money was being invested by third parties (R. 42)—now claims that it was lulled to sleep while this alleged ruse was inserted into the plan; and now claims that a fraud was perpetrated because the plan provided for an assignment of its lease, but not an assumption thereof.

Petitioner claims that the provision concerning the leases was "tucked away" in the plan. There is, however, no assertion that the plan was not legible or that the provision in question was in fine type. The record contradicts the charge that one interested in guarding the rights of a landlord would overlook the provision as to leases. This is particularly so when, as above shown, the plan specifically set forth just what obligations were to be assumed by the new corporation, which did not include the leases. It is ridiculous to assume that an interested party would fail to scrutinize the plan to see exactly how it affected him. No duty is imposed on the proponents of the plan to point out to each interested party the particular provision concerning him. An interested party, placed on notice, can hardly take the position of a trusting innocent and avoid the consequences of its own inexcusable negligence, if it were negligence, by crying fraud. The record shows that petitioner made a bargain which it now regrets and from which it seeks to escape by alleging, but not proving, fraud.

It would indeed create a serious situation if any party to a reorganization, finding itself in a position which it did not contemplate, or finding that it made a poor bargain, could later come in and vacate the final decree and amend the plan. If that were so, it would be dangerous to deal with a reorganized corporation. It would be impossible to obtain new investments. The reorganized company would have a sword of Damocles constantly over its head. This court should not sanction any such notion. A final decree should be vacated and a case reopened only upon a positive showing of fraud. No such showing has been made here.

2. The motion to vacate the final decree was addressed to the sound discretion of the District Judge and should not be disturbed unless abuse of discretion is shown.

Judge Patterson found that

> "There is nothing to show the existence of a deliberate scheme to defraud or cheat lessors" (R. 82).

The Circuit Court of Appeals likewise found that there was no fraud, stating:

> "There is also a claim of fraud, which was overruled by the district court. Even if a creditor has an absolute privilege to reopen a bankrupt estate for fraud, and even if the denial of such a motion is fully reviewable on the merits, we are satisfied that no actual fraud has been demonstrated" (R. 92).

It has been held that the reopening of an estate is a matter of sound judicial discretion. *In Re Schreiber,* 23 F. (2d) 428, 430 (Cert. denied 277 U. S. 593); *In re Ferribee,* 7 Cir. 93 F. (2d) 262; *Oehring* v. *Fox Typewriter Co.,* 272 F. 833, 835 (C. C. A. 6); *In re Pilsner Brewing Co.,* 79 F. (2d) 63, 68 (C. C. A. 9).

Judge Patterson was fully familar with every phase of this proceeding. There is no basis for petitioner's assertion that the judge was in "ignorance" of the provisions in the plan for an assignment of leases without an assumption thereof by the new corporation. The judge himself merely stated that petitioner had made no objection thereto (R. 82). He was in the best position to determine whether there was any scheme to defraud or cheat lessors, as is charged by petitioner, and in the ab-

sence of any showing of an abuse of his discretion, his decision should not be disturbed.

The answer to petitioner's argument that it had no standing to file a claim or to appear and be heard is, first, that it deliberately waived its right to terminate the lease and file its three year claim (R. 58-59), and second, it in fact did appear in the proceeding, did receive a copy of the plan, did receive notice of the confirmation (R. 48-49), and could have objected. It chose not to do so.

The Circuit Court of Appeals in its opinion of affirmance stated (R. 93):

> "A landlord is entitled to insist that his lease be either rejected or fully assumed under the plan, and he must appear in the reorganization court at the confirmation hearing or before, in order to assure adequate protection for his interests. • • • Having failed to protest, appellant is bound as a 'creditor' by the order confirming the plan • • • its only avenue of relief was to persuade the district court that it would not be unfair to reopen the plan. That avenue is now closed."

3. The record does not show the plan of reorganization to be unfair or inequitable as a matter of law.

No inferior rights were given preference. Stockholders received nothing in the reorganization (R. 14). All *creditors* were treated alike, but petitioner was not a creditor since its lease was never rejected. It cannot complain that it was to be treated on a parity with other creditors. If petitioner argues that the plan is unfair in that by failing to reject the lease petitioner was prevented from filing its three year claim and that by

assigning the lease to a corporation that did not assume it the debtor was able to rid itself of the lease without paying any compensation, the answer has been given by the Circuit Court of Appeals in the portion of its opinion just quoted. The answer to this argument also is that petitioner had the right to terminate the lease under its terms and to file its claim, which it did not do.

In any event, the petitioner had the right to make an election: it could declare the lease terminated by the 77B proceeding and come in as a creditor just as other landlords did in this very proceeding. (See: *In re Wise Shoe Co.*, 26 F. Sup. 762). Filing of the petition was an admission of insolvency. (*In Re Walker*, 93 F. [2d] 281, 2nd cir.; *In re Wil-low Cafeteria*, 95 F. [2d] 306, 2nd cir., Cert. denied, 304 U. S. 567.) Accepting any rent from the receiver, trustee or debtor in possession did not waive the right to terminate (*In re Walker, supra; Moore* v. *Risley*, 287 F. 10, 9th cir.; *Sproul* v. *Help Yourself Shoe Co.*, 16 F. [2d] 554, 3rd cir.; *Model Dairy Co.* v. *Foltis-Fischer*, 67 F. [2d] 704, 2nd cir.). Or the petitioner could waive the breach of condition, and take his chances that the new corporation would successfully continue the business and continue to pay rent. Petitioner chose to waive the right to re-enter together with the right to file a claim for damages (R. 58-59).

Petitioner made a business decision which apparently it now regrets. It has failed to show that the plan is not fair and equitable.

4. The question as to fairness cannot properly be raised by this petition.

Under any circumstances, the proper procedure to review the fairness or equity of a plan is by appeal from the order of confirmation. In all cases we have examined

wherein this question was raised, objection was taken to the plan and the aggrieved parties appealed from the order of confirmation.

But this petitioner made no objections to the confirmation of the plan despite the fact that it was a party to the proceeding (R. 82), and had received notice of all steps in the proceedings including the hearing on the confirmation of the plan (R. 38-39).

The petition does not involve an appeal from an order of confirmation or a final decree—but an appeal from an order denying a motion to vacate the final decree. One who had notice of the proceedings, and who could have properly raised the question at the hearing on the confirmation, cannot be permitted to raise the question of "fair and equitable" by a motion to vacate the final decree. To do so, would be to open the door to a stream of motions to vacate final decrees on the grounds of unfairness, by parties dissatisfied with the ultimate results. Petitioner had its day in court. (*In Re New Rochelle Coal & Lumber Co.*, 77 F. [2d] 881, 882 [C. C. A. 2nd].) This petitioner was afforded ample opportunity to be heard—but it chose to remain silent.

5. Since the rights of third parties have intervened, it would be inequitable to make a substantial change in the plan of reorganization at this late date.

The record shows that after the close of the reorganization $141,000. was paid into the treasury for necessary additional working capital; $45,569.35 was paid to the former creditors of the debtor to whom had been issued all the stock of the new corporation. In addition, the new corporation assumed the obligation to pay upwards of $39,000. to those of the former creditors who elected to take first preferred stock instead of cash.

One-half of the cash investment above referred to was made by two former creditors of the debtor and the balance by thirteen others, some of whom are relatives of those who formerly conducted the debtor's business. The cost to the new investors exceeded $225,000. (R. 39-41).

It is essential to note that this investment was made long after the case was closed and that it was made on the faith of the reorganization and in reliance upon the fact that the new company had not assumed the leases (R. 38). These facts are not disputed (R. 82).

Petitioner would have it that since some of the new investors are former creditors or relatives of those who formerly conducted the debtor's business, it would not be inequitable to make a substantial change in the plan of reorganization at this time.

There is little merit to this contention, unless it is shown that these new investors planned the sequence of events with intent to defraud petitioner. The court below found no such intent or scheme and nothing appears in the record which should disturb that conclusion. The District Judge, familiar with all the facts, weighed the equities and found that it would be inequitable to make any change in the plan to the prejudice of the new investors (R. 82).

The bankruptcy court has the power for good reason to revise its judgments on reasonable application before rights have vested on the faith of its actions. (*Wayne United Gas Co.* v. *Owens-Illinois,* 300 U. S. 131, 137.) Similarly in case of a discharge in bankruptcy the bankrupt will ordinarily engage in new business enterprises and persons may in good faith extend him credit in the belief that he has been discharged from pre-existing

debts, and their rights will be affected if the discharge is revoked. (*In re Oleson*, 110 F. 796, 798; *Narragansett Electric Co.* v. *Sabre*, 51 R. I. 37; *Marks* v. *Merrill Paper Co.*, 203 F. 16 [C. C. A. 7]; *National Broadway Bank* v. *Hitch*, 66 Hun 401, 21 N. Y. Supp. 395.)

Petitioner had notice of all proceedings. It had its day in court. It did nothing. The new investors put a very substantial sum of money into the new corporation to acquire its stock. They relied upon the order confirming the plan and upon the final decree. Judge Patterson rightly held:

> "It would be inequitable to make a substantial change in the plan of reorganization at this late day, to the prejudice of those who have invested new money in the interval" (R. 82).

CRITICISM OF SPECIFICATIONS OF ERRORS URGED BY PETITIONER.

As in its statement of the questions presented, petitioner's specifications of error are also based on false premises.

Specification (1) is, of course, a mere conclusion.

Specification (2) assumes that Judge Patterson did not know that the new corporation was not bound to assume leases under the amended plan, an assumption which we have heretofore shown to be unfounded. It assumes further that landlords holding unrejected leases were remediless which we have likewise shown and which the Circuit Court has held not to be so. It assumes, finally, that petitioner did not know "the true facts" and that it took diligent steps after such discovery, and before the

rights of third persons intervened, to remedy what it conceived to be the deficiency of the plan, none of which assumptions is justified by the record. In short, this specification of alleged error is predicated on error after error.

Specification (3) assumes that it was held that petitioner was bound by the plan solely because it received a copy. This is not the sole basis of the decisions of either the District or Circuit Courts. It further assumes that the plan did not apprise petitioner that its lease was not to be assumed by the new corporation. We have shown that such fact is apparent from the face of the plan.

Specification (4) obviously distorts the decision of the lower court into something foreign to its holding.

Specification (5) incorrectly assumes that there was an intent to prefer certain creditors over the petitioner, and seeks to draw a non-existent parallel between the *Kansas City Railway* case and the instant case.

Specification (6) is a flagrant example of petitioner's and not the court's error. Petitioner complains that the court should "at least" have vacated the stay contained in the order of June 30, 1939, which enjoined suits against the new corporation or any of the assets transferred to it by the debtor, without giving any reasons anywhere why the court should treat this case differently from any other.

Specification (7) urges as an error what we have shown to be well settled cannot be deemed an error, that is, that the re-opening of estates is addressed solely to the sound discretion of the District Court. The specification also urges as an error the holding that there was no abuse of discretion although the record is barren of a scintilla

of evidence indicating that Judge Patterson had abused his discretion.

Specification (8) reiterates the fallacious assumption that the Merchandise Creditors' Advisory Committee was guilty of a breach of trust and implies that that committee "obtained" approval of the plan, as if no one else had an opportunity to come in and object, although both the District and Circuit Courts have held that the petitioner, for one, had an opportunity to do so and remain silent, and that there was no unfair advantage taken by any creditor.

ANSWER TO PETITIONER'S STATEMENT OF REASONS FOR GRANTING THE WRIT.

We shall not encumber this brief by reiterating the facts and conclusions heretofore advanced to show that the writ should not be granted and that there is nothing in this case requiring a review by this court. We do, however, desire to answer briefly petitioner's recital of reasons why the writ should be granted (petition, pp. 16-24).

Petitioner continues its method of arguing from false premises. It begins (p. 16) by arguing that this is a novel case by assuming that the plan was deliberately framed to prefer one group of creditors over another, for which there is not the slightest basis in the record. It seeks to draw an analogy between this case and that of *Howard* v. *Maxwell Motor Car Co.*, a case which is not in point and which is based on the relationship between stockholders and creditors and arises from the equitable rights of the creditors as against stockholders.

> "Plaintiffs (Lessors), therefore, retained the right to *subject the interest of the old stockholders*

> in the property to the payment of their claim. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities." (Italics ours.)
>
> 269 F., at p. 305.

In the case at bar the stockholders of the debtor were to and did receive nothing (R. 14).

Although this is a simple case involving solely a question of judicial discretion in refusing to reopen an estate, petitioner, in order to procure the writ, would transform this application into one of "far reaching importance in the field of reorganization law," involving the manoeuvering of landlords and even "other classes of creditors" out of any opportunity to participate in the avails of the reorganization, something which is without the slightest basis in the record and which the two courts below have held not to be the fact.

The question in this case is not at all as broad as stated by the petitioner (pp. 16-17), involving an alleged perversion of the processes of the District Courts. It is a question as to whether the District Court can possibly be charged with an abuse of discretion because it refused to re-open this estate, after the rights of third persons who relied on the closing thereof had intervened, at the instance of this petitioner who, as shown, appeared in the proceeding, waived its right to come in as a creditor, moved in the proceeding to compel the payment of rent, had notice of all proceedings, including that on confirmation of the plan as well as a copy of the plan, remained silent and failed to object to confirmation, saw the plan carried out and knew that new money was being invested by third persons.

Referring now briefly *seriatim* to the specific reasons advanced by petitioner (pp. 16-17) in support of the writ:

1. and 2. It would be a work of constant repetition to demonstrate in detail anew the fallacies which petitioner continues to reiterate and which we have heretofore shown to be without foundation. An examination of the cases cited under reason (1) (petition, p. 17) will show quite clearly that the holding of the court below not only does not conflict with these decisions but that they are not even applicable to the case at bar. For example, *Kansas City Railway Co.* v. *Guardian Trust Co.*, clearly refers, as petitioner itself states, to "an intent to prefer the stockholders and leave the unsecured creditors inadequately provided for." We have already shown that in the instant case there was neither an intent to prefer anyone nor was there any question as between creditors and stockholders. This distinction, which petitioner constantly overlooks, was stated quite clearly in *Fogg* v. *Blair*, 133 U. S. 533, 541; and *Oehring* v. *Fox Typewriter Co.*, 272 F. 833, 835 (C. C. A. 6). See also *Hollins* v *Brierfield Coal & Iron Co.*, 150 U. S. 371. Petitioner repeats the unjustified assumptions that the Merchandise Creditors' Advisory Committee purported to represent all the creditors, that it disobeyed the law and submitted a plan which it knew to be unfair, that there was nothing on the face of the plan that unrejected leases were not to be assumed by the new corporation, and that landlords, particularly petitioner, who had appeared throughout the proceeding and were apprised of all steps taken therein, had the right to assume that they were not to be affected by the plan. The language of these two paragraphs of the petition is loaded with erroneous assumptions.

3. *Linn Timber Co.* v. *United States* is completely inapplicable. There the court said:

> "We are considering whether a man who knows that his title is bad and will be attacked can call into being a corporation which he owns, in order to save the property, make a deed to it, put the deed in his pocket, leave it unrecorded, and without the need of trusting even an accomplice, can keep it with perfect security until the statute has run, and then set up that his creature owns the land. We are deciding that if a secret transfer of wrongfully held land is made in this way * * * the trick must fail."

Manifestly, this case has no application here. To the very same effect is *Wilson Coal Co.* v. *United States,* which likewise is inapplicable. Petitioner predicates a charge of fraud against the new investors solely because some of them are former creditors or relatives of those who formerly conducted the debtor's business. The court below found no evidence of an intent to defraud petitioner and that finding is fully supported by the record. We have already demonstrated the inapplicability of *Kansas City Railway* v. *Guardian Trust Co.* In *Hurd* v. *N. Y. & C. Steam Laundry Co.,* the assets of the debtor were transferred to another corporation which paid for the same in stock which was paid out to the stockholders of the old corporation without regard to creditors. It was distinctly a device intended to bar creditors. In such case the assets remain a trust fund which creditors may follow. *Wilson* v. *Aeolian Co.* is, for the same reasons, wholly inapplicable.

4. In order to avoid the risk of tedium, the most that it is necessary to say of this reason is that it consists of

numerous charges and is replete with characterizations such as illegality, railroading, sharp dealing and the like, none of which is substantiated by the record as we have heretofore demonstrated.

5. Aside from the fact that petitioner failed to object to or appeal from the confirmation of the plan which it now condemns and aside from the unjustified assumption that the petitioner was "effectively barred from participating in the reorganization through the mere failure to provide for him in the reorganization plan," the extract quoted from the article by Mr. Justice Douglas and Mr. Jerome N. Frank in 42 Yale Law Journal is wholly inapplicable to the case at bar. In its brief to the Circuit Court the petitioner said of this extract

> "This conclusion, these learned authors went on to say, 'follows from the general equitable principles enunciated in the *Boyd* case * * * and a long line of prior and subsequent decisions in the Supreme Court and in the lower Federal Courts.'"

The doctrine of the *Boyd* case (*Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482) and related cases is inapplicable here. Those cases stand for the proposition that the stockholders of an insolvent corporation have no right or interest in the assets of the corporation; that the assets of such corporation belong to the creditors; that no plan of reorganization can be approved which gives any rights to stockholders, where such rights reduce the interests of the creditors in the assets. The theory upon which this doctrine rests is that, *so far as stockholders* are concerned, the property of the insolvent company is a trust fund for creditors and must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. (*Fogg*

v. *Blair, supra.*) Thus, in the *Boyd* case the court said, in 228 U. S. at page 502:

> "For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, *the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company.*" (Italics ours.)

The trust, it is seen, is impressed upon the interest of the old stockholders, which was subordinate to the creditors' claims. What they received is held by them subject to the creditors' superior rights.

6. Aside from the fact that the opening statement of this reason misinterprets the meaning of the Circuit Court opinion, the *Consolidated Gas* case cited by petitioner is wholly inapplicable here. The facts in this case are so different that the *Consolidated* case cannot be treated as controlling or even applying to this case.

In that case the confirming order reserved for further determination the question of affirmance or rejection of executory contracts, with the proviso that in the event the contracts were later rejected, the court would determine what damages were caused by the rejection and would provide for payment thereof by the reorganized corporation.

The appeal was from the reservation in the confirming order of the right to later reject leases and pay damages. It must be noted, first, that this reservation as to the leases was not made in the plan of reorganization—but in the confirming order.

The court specifically stated that the question as to a reservation *in the plan itself* was not before it in that case. If creditors had accepted a plan which contained such reservation, it is difficult to see how any objections to such procedure could be raised. In the present case, the plan of reorganization plainly sets forth the disposition that was to be made of unexpired leases. This also distinguishes this case from the *Consolidated* case.

Second, the objection in the *Consolidated* case was that creditors assented to a particular plan, but by the reservation contained in the confirmation order this plan could be changed, in that, if the leases were later rejected, the interests of the creditors would be diminished to the extent that assets of the reorganized corporation would be used to pay the damages fixed on such rejection. Creditors would receive *less* than they consented to receive. This was the real defect in the *Consolidated* case. Such defect is not present here—but, to the contrary, that is exactly the result that would be obtained if petitioner were successful here. The entire plan would be so materially altered by compelling the new corporation to assume the leases, that creditors' assent to the amended plan would be required, (Bankruptcy Act, Sec. 222) and such procedure has been rendered impossible by the intervention of the rights of third parties who have invested new money in the corporation relying upon the plan and the order confirming it.

7. This reason begins with the erroneous assumption that the absence of actual fraud was the sole reason for the refusal of the Circuit Court to grant petitioner's application. A reading of the opinion of that court as well as the opinion of the District Court, whose determination is, in the last analysis, the basis of the present petition, will show that this is not so. We have

already shown that the cases cited in this reason are inapplicable here, and the remaining case cited, *In re Alamac Operating Corp.*, is likewise not in point. There again the stock of the new corporation went to the old stockholders and furthermore there was no evidence that the non-assenting creditor was cited so as to bind it, which in itself is sufficient to distinguish that case from the instant one. Petitioner reiterates its complaint (p. 23), on which we have already commented, that the District Court was in error in, consistent with its denial of petitioner's application to reopen the proceeding, "even" declining to allow petitioner to defeat the court's decision by refusing to allow it to proceed against the assets transferred to the new corporation.

We submit that there is no basis whatsoever for petitioner's reflection (p. 24) upon the decision of the Circuit Court to the effect that it limited its own power to redress "the wrong" to petitioner because of the absence of actual fraud. For reasons in addition to the absence of actual fraud, the Circuit Court did not see fit to reopen this estate, just as for similar broad reasons of discretion the District Court held likewise. We see nothing "undesirable" about these decisions.

We have heretofore shown that it would be undesirable if any party to a reorganization, finding itself in a position which it did not contemplate, or finding that it made a poor bargain, could later come in and vacate the final decree and amend the plan; that it would thus be dangerous to deal with reorganized corporations; and that it would be impossible to obtain new investments.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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